

THE TERRAIN OF ARROGANCE AND NON-COMPLIANCE WITH COURT ORDERS BY GOVERNMENT OFFICIALS

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Abstract

The Kenyan dream was founded on aspirations of a populace that longed for liberty of the land and the mind. All can be traced in the 2010 Constitution that sought to quench the thirst through both economic and political autonomy. The powers were finally reclaimed by the people who assumed ownership of the sovereignty⁹² upon validating it through a popular referendum. In the text, rule of law was proudly envisioned to hold the masses, their democratically elected shepherds and appointed public servants equal before the law and accountable to the people who possess the sovereign power.

The power was subsequently conferred on the three arms of the government which were to affect the people`s ambitions. In the presence of a power-driven executive alongside a legislature that cannot express itself independently, the people have been subjected to unprecedented atrocities that cannot survive the scrutiny of the law. In the presence of an interest and fear led regime, the Kenyan society is left at the only choice of a burdened judiciary whose orders have been the subject of arrogance display.

In an era where the judiciary is at the brink of loosing the trust of the people when senior government officials continuously trash its dignity, I would dwell into the ever-growing crisis. This paper would assess the possible reasons behind the wild culture of contempt of court orders by senior public officials in the presence of a just, open and a democratic society.

Keywords: arrogance, contempt of court, rule of law.

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⁹² Constitution of Kenya 2010, art 1 (1).

1.0 Introduction

The warm blood of our heroes and their foot prints while transcending into the deepest points of the forests are the foundation of the Kenyan cultural practices. The battle frontlines they took are reflected in the daily endeavour to uplift the living standards of the majority among the populace. Their tears while facing the wrath of the imperial power are still visible in the eyes of their off springs who keep on facing barriers towards true economical and political emancipation. Was true liberation never granted at independence? Or had the alien devil been replaced by a friendlier looking monster? Was there independence in the first place?

The quest for justice derived the need of having a strong independent judiciary that could oversee the conduct of the executive and their trainees in parliament. The infamous culture and trend of abuse of office and overreaching mandate by the executive and their allies was to be mitigated by a powerful independent judiciary that could interpret the law without undue influence or threats⁹³. It was in public interests to be led by democratically elected servants who respect the rule of law and promote human rights to ameliorate the Kenyan society from the dungeon of miseries to a better society in the era of rights across the globe.

1.1 Problem Statement

In an attempt to cure the mischief, parliament enacted the Contempt of Court Act which was to mitigate and punish the arrogance associated with disregard of court orders⁹⁴. The crisis was ever growing threatening rule of law when the state assumes dictatorial traits in the phase of democracy. In the Uhuru led regime, the issue became rampant when the then cabinet secretary continuously violated human rights against orders of the court⁹⁵. The right to citizenship was under threat when popular opposition figure was subjected to unprecedented misery by being deported to alien lands deprived of his liberty right. Such occurrences were being witnessed for the first time following the promulgation of the 2010 Constitution in a country which was filled with high hopes with the dawn of a progressive era. The court proceeded to find the cabinet secretary and the head of police guilty for contempt of court thus convicted them accordingly⁹⁶. However, the sentencing was ineffective as the top officials roomed around freely.

Social movements have been on the front line to correct the mischief but with less success. Contempt of court was even further served to orders emanating from cases by good governance activists⁹⁷. Omtatah was

⁹³ Constitution (n 1) art 160.

⁹⁴ Act 46 of 2016.

⁹⁵ Miguna Miguna v Fred Matiang`i, Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 8 others[2018] eKLR.

⁹⁶ Miguna (n 4).

⁹⁷ Jillo Kadida, 'Omtatah wants Matiang`i jailed for disobeying court order' *The Star* (Nairobi, 11 March 2021) < <https://www.the-star.co.ke/news/2021-03-11-omtatah-wants-matiangi-jailed-for-disobeying-court-order> > accessed on 5 October 2024.

over the Kamiti Maximum Prison management for having a shadily conducted tenders. In an attempt to illuminate the ray of transparency, the court ordered the government to supply activist with the restricted documents which was utterly disregarded. The incident marked a growing frustration over the disregard of court orders by government officials thus offending the rule of law. It was not only injustice by holders of people power but also a setback on the progress made by the judiciary. It undermines the integrity of the judiciary thus subjecting its dignity into gutters.

The subsequent regime is not spared off the record of shame as they still implored on the use of the axe to disregard court orders in display of arrogance. Deputy Inspector General of the Police Service, Mr. Masengeli, had the headlines at his service when Justice Mugambi had enough of his open and utter disregard of his orders for him to appear in person and give an explanation over the whereabouts of three abducted persons⁹⁸. Such acts have been the face of the ruling class thus tattering the intended objectives of the Kenyan people. Despite having the conviction quashed after possible threats disguised as an apology, it still paints a picture of a fragile state that is yet to survive from impunity.

The national values and principles of good governance⁹⁹ were geared towards having a state governed in a just and accepted manner to prevent the past associated with both substantive and procedural irregularities from reoccurring. These deliberate acts beg the question on how best the Kenyan dream can be actualize in the presence of arrogant state machinery who always find the way into the system. Is the current structure inefficient to serve the interests of the people at best? Is the current ruling elite class the problem to our national trauma? Is change of the ruling class the solution? Do we need a change of the whole legal structure to restore faith of the citizenry in the judicial system.

Several scholars have similarly investigated the same issue with attempts of rectifying the mess but with little success to be proud of. Edward Rubin poses inquires in his article on the best way to be utilized by the judiciary in curbing the growing arrogance whose impact is on the rule of law¹⁰⁰. It is of importance that we channel our capabilities in restoring dignity in our judicial systems before a total collapse of the trust held by the people with the sovereign power.

This paper would revolve around the saga to explore the corrective measures that can possibly uplift rule of law in the face of arrogant state machinery that continuously subject the people into misery and sufferings. By use of table study method, I will be steering into the wilderness to unveil the possible saviour to the people of Kenya.

⁹⁸ Benjamin Muriuki, 'Acting IG Masengeli Sentenced |To 6 Months in Jail, Given Seven Days To Avoid Prison' (Nairobi, 13 September 2024) < <https://www.citizen.digital/news/acting-ig-gilbert-masengeli-sentenced-to-6-months-in-jail-given-seven-days-to-avoid-prison-n349442> > accessed on 5 October 2024.

⁹⁹ Constitution (n 2) art 10 (2)(d).

¹⁰⁰ Edward Rubin, *Should Courts Punish Government Officials For Contempt?* (JOTWELL 2018) < <https://juris.jotwell.com/should-courts-punish-government-officials-for-contempt/> > accessed on 5 October 2024.

1.2 Amendment to Election Laws on Candidate Approval

The executive arm of government in partnership with their political counterparts in parliament seek way into office through majority vote in every general election. Therefore, there arise a higher probability of obedience to court orders if any act to the contrary would automatically be a dis-qualifier. This calls for an immediate amendment to the election laws on additional disqualifications for nomination of candidates¹⁰¹.

The amendment should be geared to empower the Independent Electoral and Boundaries Commission to decline the nomination of any person who has been in any way associated with contempt of court either directly or indirectly. Such a harsh statutory provision would likely have the ruling party either refraining from acts that would attract litigation or compel its members to obey court orders.

In the presence of such a legal atmosphere, there would be less need to overburden the courts with prospects of being involved in political ruffles as arrogance gets to be wildly displayed on high national stages. Even though scholars such as the likes of Edward Rubin have weighed the need for the courts to punish government officials¹⁰², it is beyond their reach due to financial and structural constraints. If courts are made to go for the boxing ring with the other arms of the government every now and then, they are likely going to lose due to their naturally weak foundation that was definitely not crafted for such activities.

Of interest would be the issue of public servants who are not necessarily elected into office but they are appointed through other recognized lawful means. This can be an issue as some of these persons do not have any interests in the political arena yet they serve in a crucial position in running of the daily state affairs. They include but not limited to cabinet secretaries, head of parastatal and public institutions, security persons among others. It is also important at this stage to bring to your attention the familiar scenarios that I had introduced earlier were majorly acts committed by political elites through cabinet secretaries and senior security officers. The non-political persons are the face of the regime who are occupy the front line in realizing the policies set by the ruling class. If the amendment would have senior members loose their political right to participate in elections as candidates, most definitely, they would always compel their juniors to act as ordered.

The dignity of the courts should not be toyed with persons who are professing their personal desires and aspirations over and above the need of the society. If need be, individual rights can be limited for the purpose of realizing a societal need in an open and democratic society as it was reiterated by the European Court of Human Rights in *S and Marper v United Kingdom*¹⁰³. This finds support even within the Kenyan Constitution of 2010 which provides for conditions that can be satisfied to limit a human right within its

¹⁰¹ Election Act No. 24 of 2011, s 26.

¹⁰² Edward (n 9).

¹⁰³ Applications Nos. 30562/04 and 30566/04

context and other recognized instruments¹⁰⁴. it would serve retributive justice the people of Kenya if they do not have arrogant persons serving within the system after expressly undermining the concept of rule of law. It also serves as a reminder to the government officials that no one is above the law which is supreme, and it ought to be respected without qualifications.

Such a change in the legal structure would definitely earn the courts the true position that was intended by the drafters of our progressive constitution. The dignity of the courts is not a privilege to be subjected to political alms, but it ought to be a condition precedent in any democratic society that values justice. Failure to that, it will open ways of having backward civilian dictatorship who would create the privilege of do what you can and take what you want. If one can comfortably jeopardize the progress of millions of persons who have generously allowed you to actualize their dreams, then people have a subsequent right to hold back onto your aspirations.

1.3 The Boycott

The court is known as an avenue to resolve issues affecting the society, but the judiciary itself, can try to solve its own problems. Thousands of people walk in and out of the Kenyan courts as indicated by the statistics made by the Institute of Economic Affairs¹⁰⁵. In 2023, it was estimated that the judiciary closes 358,062 cases with an average of an approximate 231cases per judge in a year¹⁰⁶. This demonstrates the magnitude of operation conducted by the judiciary which deserves recognition by all persons within the state borders. If the judiciary boycotts the bench in retaliation to arrogant acts of disregards of its orders by the government, the impact would like hazardous.

In a united judiciary under the guidance of the chief justice, it can initialize a boycott of all court dealings until the government adheres to the court ruling. The general public that would definitely feel the ramification of the nation-wide boycott would compel their respective elected leaders to comply with the orders or face their wrath on the ballot box. Critics would subject the recommendation on a tough scrutiny to challenge the rationalism and logic behind it. However, in an attempt to secure goodness for the general public, the road can be rough as we try to attain highest level of respect for the institution that deliver justice. The crowded police stations and scenes of stranded litigants can be a temporary evil for a future of adherence to the rule of law.

The boycott can further be effected if the bar can join in support of the bench in instances where the ruling regimes attempt to rub mud on the law on extreme levels. Through the professional body, Law Society of Kenya, a national wide boycott can be effected until the government gets to understand the true position of

¹⁰⁴ Constitution (n 8) art 24.

¹⁰⁵ Leo Kipkogei Kemboi, 'Number of the Week: Case Resolution in Judiciary' (Nairobi, 30 October 2023) <<https://ieakenya.or.ke/blog/number-of-the-week-case-resolution-in-judiciary/>> accessed on 5 October 2024.

¹⁰⁶ Leo (n 14).

the law in Kenya. The bar has done it before¹⁰⁷, and it can do it now for the sake of the dignity of the Kenyan people and their respective courts which they empowered through the 2010 Constitution¹⁰⁸. Rule of law requires all persons, institutions, and organs to be accountable to the laws that have been publicly promulgated in an open, just and democratic society. The drafters of the Constitution of Kenya 2010 so it fit to have principles of rule of law and good governance as national values that guide the conduct of all persons.¹⁰⁹In privity of the possible mischief, state and public officers were specifically targeted.

1.4 Conclusion

The people of Kenya have ever since been fighting since the days of our founding forefathers. The war has always been a constant act with the enemy as a variant. Different forms of war with different foes. Yesterday, we sought for our total liberation and today we have been faced with an internal ailment and no longer an alien with a gun and a bible in the hands.

¹⁰⁷ Nyaboga Kiage & Steve Owino, 'Lawyers threaten to boycott courts over Huduma plans' (Nairobi, 7 February 2024) <<https://nation.africa/kenya/news/lawyers-threaten-to-boycott-courts-over-huduma-plans--4516372> > accessed on 5 October 2024.

¹⁰⁸ Constitution (n 13) art 1(3) (c).

¹⁰⁹ Constitution (n 17) art 10 (2) (a) & (c).